UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL VASQUEZ,

Plaintiff,

- against -

THE CITY OF NEW YORK et al.,

Defendants.

14 Civ. 491 (RMB)

DECISION & ORDER

I. Introduction

On April 25, 2014, Michael Vasquez ("Plaintiff" or "Vasquez") filed an Amended Complaint ("Complaint") against the City of New York ("City"), New York City Police Department Detective Joseph Litrenta ("Detective Litrenta"), Manhattan Assistant District Attorney Ryan W. Brackley ("ADA Brackley"), and "Police Officers 'John Doe' #1–5" ("Doe Defendants," and collectively, "Defendants"), alleging, among other things, that Plaintiff "was wrongly arrested [on February 25, 1997] and charged without probable cause [and] was wrongfully convicted" of felony robbery charges, deprived of his liberty from 1997 to 2012 while incarcerated at Coxsackie Correctional Facility and other correctional facilities, and suffered "physical and psychological injuries" as a result of Defendants' unconstitutional conduct. (Am. Compl., filed Apr. 25, 2014 ("Compl."), ¶¶ 1, 33, 121.) Vasquez alleges "deprivation of [his] Federal civil rights," "conspiracy to violate civil rights," false arrest and false imprisonment, malicious prosecution, malicious abuse of process and municipal liability under the Fourth, Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution and 42 U.S.C. §§ 1983, 1985, and 1986.[1] (Compl. ¶¶ 1–2.) Vasquez also alleges that Defendants are liable for negligence and intentional infliction of emotional distress under New York State law. (Compl. ¶¶ 111–120.)

On May 29, 2014, Defendants filed a joint motion to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure arguing, among other things, that: (1) Plaintiff's claim against Defendants for "deprivation of civil rights" should be dismissed because, "[t]o the extent this claim is based on Det. Litrentra's testimony in any proceeding—Grand Jury, pre-trial hearings or trial . . . a trial witness has absolute immunity with respect to any claim based on the witness' testimony"; "[t]o the extent plaintiff purports to assert a Brady claim against Det. Litrentra [based upon alleged exculpatory statements made during the investigation], the disclosure of the alleged statement to ADA Brackley fully discharges Det. Litrentra's Brady obligation"; and "[t]o the extent plaintiff purports to assert a Brady claim against ADA Brackley, the claim is barred by the doctrine of absolute immunity"; (2) Plaintiff's claim against Defendants for "conspiracy to violate civil rights under [§] 1985" should be dismissed because "[i]mmunity for witnesses may not be circumvented by claiming that the witness conspired to present false testimony"; (3) Plaintiff's malicious prosecution claim should be dismissed because "there was probable cause to prosecute [Vasquez] as a matter of law based on Janette [Andriuolo]'s identifying him as the robber"; (4) Plaintiff's malicious abuse of process claim should be dismissed because Plaintiff's allegations are "in conclusory terms, without factual support," and because "there was probable cause to arrest Vasquez"; (5) Plaintiff's municipal liability claim against the City should be dismissed because

[1] Plaintiff "withdr[ew] the third cause of action of false arrest and false imprisonment." (Affirmation in Opposition to Defendants' Motion for an Order Dismissing Plaintiff's Complaint in Its Entirety, With Prejudice, dated June 30, 2014 ("Pl. Opp'n"), at 13.)

Vasquez "has not alleged an underlying violation of his constitutional rights" and "has failed to allege a pattern of similar constitutional violations by police officers which went unaddressed by the City"; (6) Plaintiff's negligence claim against ADA Brackley under New York State law fails because "New York law does not recognize any claim based on a purportedly negligent criminal investigation or prosecution"; and (7) Plaintiff's intentional infliction of emotional distress claim should be dismissed because the Plaintiff's allegations do not show that Defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss, dated May 29, 2014 ("Defs.' Mem."), at 7–10, 12–16, 18–19.)

On June 30, 2014, Plaintiff filed his "Affirmation in Opposition to Defendants' Motion for an Order Dismissing Plaintiff's Complaint" arguing, among other things, that (1) "Plaintiff alleges in his first cause of action . . . violations of plaintiff's 6th Amendment Constitutional Right to have compulsory process for obtaining witnesses who would testify in his favor" and "a genuine issue of fact exists as to whether the federal constitutional rights and civil rights of the Plaintiff Michael Vasquez was [sic] violated with the defendants non-compliance with the material witness order and did the defendants do everything they could have done to obtain the attendance of Rigo Gonzalez, Jr. to testify at criminal trial of Plaintiff"; (2) "[t]here is a genuine issue of material fact as to whether the defendants conspired to violate the constitutional rights of the plaintiff"; (3) Plaintiff's malicious prosecution claim should not be dismissed because "Plaintiff . . . has presented evidence, in his complaint and in this affirmation in opposition, sufficient for a reasonable jury to find that his indictment was procured as a result of police conduct undertaken in bad faith and without probable cause and achieved by denying the plaintiff his 6th, 5th, and 14th amendment constitutional right to have compulsory process for obtaining witnesses in his favor"; (4) Plaintiff's malicious abuse of

process claim should not be dismissed because "Detective Joseph Litrenta and the other John Doe Police Officers, had an improper purpose to achieve a collateral purpose beyond or in addition to [Plaintiff's] criminal prosecution and wrongful conviction"; (5) Plaintiff's municipal liability claim should not be dismissed because "[t]he plaintiff has shown several underlying constitutional violations" and "has presented numerous cases where individual constitutional rights have been violated by the defendant City of New York which shows that the City of New York has shown deliberate indifference by a municipality to commit repetitive constitutional violations"; (6) the Court should "defer judgment on [Plaintiff's negligence] cause of action until after discovery has been completed"; and (7) Defendants' conduct was "so outrageous and extreme that th[e] claim [for intentional infliction of emotional distress] should be heard by a jury." (Pl. Opp'n at 8, 11, 13, 15, 19, 21–22.)

On July 7, 2014, Defendants filed a reply. (Defs.' Reply in Support of Their Mot. to Dismiss, dated July 7, 2014 ("Defs.' Reply")). Extensive oral argument was held on November 3, 2014. (See Hr'g Tr., dated Nov. 3, 2014 ("11/3/14 Tr.").)

For the reasons stated below, Defendants' motion to dismiss is granted.[2]

II. Background

On January 11, 1997, Janette Andriuolo and Rigo Gonzalez, Jr. were sitting in a parked vehicle at 192nd Street and St. Nicholas Avenue in Manhattan when "an individual approached [the] car . . . allegedly pointed a simulated gun at Janette Andriuolo and Rigo Gonzalez Jr. and allegedly ordered them out of the car." (Compl. ¶ 13.) The robber drove off with the vehicle and Andriuolo's purse. (Id.)

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[2] Any issues raised by the parties not specifically addressed herein were considered by the Court on the merits and rejected.

Later that day, Andriuolo told Defendant Litrenta, the police officer assigned to investigate the robbery, that "she did not know the name nor the identity of the person who had committed the crime." (Id. ¶ 14.) However, on January 12, 1997, Litrenta received a voice message from a then-unknown individual who "left information that the person that perpetrated the crime was named Mikey Vasquez." (Id. ¶ 16.) At some point between January 12 and February 18, 1997, Andriuolo told Detective Litrenta that she was the one who had left the January 12 voice message implicating Vasquez, and that she had been told this information by her boyfriend, Raul Gonzalez. (Id. ¶¶ 24, 30, 63, 106.) According to the Complaint, "[Raul] Gonzalez . . . never witnessed nor actually saw the robbery." (Id. ¶ 57.)

On February 18, 1997, Litrenta showed Andriuolo a photographic array containing Vasquez's picture, and Andriuolo identified Vasquez as the robber. (Id. ¶ 23.) See also People v. Vasquez, 36 Misc. 3d 1236(A) at *3 (N.Y. Sup. Ct. 2012). Plaintiff alleges that Andriuolo's photo identification of Vasquez "was tainted because she could not independently identify Michael Vasquez as the person who committed the crime," and "was in fact relying on the accusation of her boyfriend, Raul Gonzalez, an individual who was not an eye witness to the actual criminal acts, when she implicated the Plaintiff, Michael Vasquez, as the perpetrator of the crimes." (Compl. ¶¶ 63, 74.)[3]

At oral argument on November 3, 2014, Plaintiff seemed to suggest for the first time the issue as to whether Andriuolo had participated in multiple photo arrays which included Vasquez's

[3] The photo array identification of Vasquez was followed by a live lineup identification on February 25, 2014 at which Andriuolo (again) identified Vasquez as the robber. These identifications were upheld at a Wade hearing conducted by Justice Dorothy A. Cropper. (See Tr. of July 8, 1997 Wade Hearing (Exhibit A to Decl. of Arthur G. Larkin in Supp. of Defs.' Joint Mot. to Dismiss) ("Wade Tr.") at 31:14 –25, 37:19 ("The motion is denied."); see also discussion at p. 7 infra.)

photo. The parties were asked by the Court to submit record evidence on this issue, which they did on November 4 and 5, 2014, respectively. Plaintiff's submission, dated November 3, 2014, included one transcript page of Detective Litrenta's testimony at a 2012 § 440.10 evidentiary hearing and clearly does not support the contention that Plaintiff Michael Vasquez's photo was included in any photo array other than the one shown to Andriuolo on February 18, 1997. (See Attachment to Letter from Herbert Moreira-Brown to Hon. Richard M. Berman, dated Nov. 3, 2014 ("[PLAINTIFF'S COUNSEL]: Was Michael Vasquez in each one? [DET. LITRENTA]: "No, well, there was other Michael Vasquez's, yes.").) This is consistent with Detective Litrenta's testimony at the July 8, 1997 Wade hearing. (Wade Tr. at 14:18–21 ("[ADA BRACKLEY]: Prior to her viewing this particular [February 18, 1997] photo array, did she [Andriuolo] look at any other photo arrays? [DET. LITRENTA]: No."); id. at 29:15–30:20 ("[PLAINTIFF'S COUNSEL]: To the best of your knowledge, between January 11th, when you first spoke to the victim and February 18 photos, did she [Andriuolo] ever look at any other photos, either an array or just a batch of photos . . . [DET. LITRENTA]: She looked at photos in our office . . . [PLAINTIFF'S COUNSEL]: Would you be able to tell me whether or not she saw Mr. Vasquez's photo at that time? [DET. LITRENTA]: No. She did not. [PLAINTIFF'S COUNSEL]: You are sure about that? [DET. LITRENTA]: I am positive. [PLAINTIFF'S COUNSEL]: Other than that one incident was there any other time when the victim looked at photos prior to February 18? [DET. LITRENTA]: No.").)[4]

Plaintiff alleges that, during Detective Litrenta's investigation, Rigo Gonzalez, Jr., presumably the only other eyewitness to the crime apart from Andriuolo (and an acquaintance of

[4] The transcript of the Wade hearing was incorporated by reference in Plaintiff's Complaint, (see Compl. ¶ 30), and thus may be considered on a Rule 12(b)(6) motion to dismiss. See Avon Pension Fund v. GlaxoSmithKline PLC, 343 F. App'x. 671, 675 n.2 (2d Cir. 2009).

Vasquez), had "stated to Detective Litrenta that Michael Vasquez did not commit this crime." (Id. ¶¶ 25–27). Detective Litrenta, nonetheless, "focused his investigation on Michael Vasquez." (Id. ¶ 15.)

Court proceedings make clear (but the Complaint does not indicate) that Vasquez was arrested on February 25, 1997. See People v. Vasquez, 36 Misc. 3d 1236(A) at *3, 11 n.3. (See also Wade Tr. at 31:18–25.) Following Vasquez's arrest, Andriuolo (again) identified him as the robber in a live lineup. See People v. Vasquez, 36 Misc. 3d 1236(A) at *3, 11 n.3. (See also Wade Tr. at 31:14 –25.)

On March 3, 1997, a New York County grand jury indicted Vasquez on one count of robbery in the first degree and one count of robbery in the second degree. (See Compl. ¶ 25.) See also Vasquez, 36 Misc. 3d 1236(A) at *1. On July 8, 1997, as noted, a Wade hearing was held, during which ADA Brackley called Detective Litrenta to demonstrate the propriety of Andriuolo's identifications of Vasquez in the photo array and in the lineup. (See Compl. ¶ 30.) Among other things, Detective Litrenta testified regarding the events leading up to the February 18, 1997 photo array, including Andriuolo's January 12, 1997 voice mail message. He also testified that the "tip" that Michael Vasquez was the robber came to Andriuolo from Raul Gonzalez. (Id.; see 7/8/97 Tr. at 26–31.) At the conclusion of the Wade hearing, the trial Court denied Vasquez's motion to suppress Andriuolo's photo identification and her lineup identification. (See Wade Tr. at 37:19.) Andriuolo went on to positively identify Vasquez at trial. See Vasquez, 36 Misc. 3d 1236(A) at *4.

Vasquez's criminal trial in New York State Supreme Court, New York County began on September 30, 1997. (Compl. ¶ 15.) According to the Complaint, Litrenta "gave intentionally misleading testimony when he stated that he focused the investigation on Michael Vasquez because of a 'tip' that an 'informant' had given him when he knew that the alleged 'informant' was actually

the complaining witness Janette Andriuolo." (Id. ¶ 28) Plaintiff also alleges that "Defendants . . . refused to disclose the exculpatory statement of a victim of and an eyewitness to the crime, Rigo Gonzalez, Jr. . . . that Michael Vasquez was not the person who committed the crime." (Id. ¶ 72.) Further, Plaintiff contends that "Defendant Brackley refused to grant full or limited immunity to allow [Rigo Gonzalez Jr.] to testify at the grand jury" and "fail[ed] . . . to secure the attendance of . . . Rigo Gonzalez, Jr., pursuant to a material witness order, to testify at trial." (Id. ¶ 103.)

On October 7, 1997, Vasquez was convicted by a jury of two counts of felony robbery. He was sentenced on November 20, 1997 to "20-year[s] to [l]ife" in prison. (See id. ¶ 29.) [5]

Procedural History Following Vasquez's Conviction

Vasquez appealed his conviction to the New York State Supreme Court Appellate Division. On January 6, 2000, the appeals court found that the "verdict was based on legally sufficient evidence and was not against the weight of evidence. We see no reason to disturb the jury's determinations concerning identification. By placing his hand in a paper bag and pointing it at the victim, defendant displayed what appeared to be a firearm." People v. Vasquez, 268 A.D.2d 236 (N.Y. App. Div. 2000). On January 13, 2000, Vasquez filed a pro se application to the Appellate Division for permission to appeal to the New York State Court of Appeals which was denied on February 17, 2000. Vasquez, 36 Misc. 3d 1236(A) at *2. On March 28, 2001, Vasquez filed a writ of error coram nobis in the Appellate Division on the grounds of "ineffective assistance of appellate

[5] Supreme Court Justice Lewis Bart Stone's opinion, dated June 13, 2012, vacating Vasquez's conviction and ordering a new trial, reached several different conclusions than those contained in the Complaint. For example, Justice Stone found, among other things, that Andriuolo "passed the standard police identification procedure with flying colors;" that Detective Litrenta "developed sufficient evidence to show probable cause;" and that "[h]aving a good case, on a relatively minor crime, and an identified perpetrator with an extensive record of robbery, [Detective] Litrenta passed on his file to the District Attorney for processing." Vasquez, 36 Misc. 3d 1236(A) at *19–20. (See discussion of Justice Stone's opinion, infra pp. 10–11.)

counsel." See People v. Vasquez, No. 1810/97 (N.Y. App. Div. Sept. 20, 2001). This application was "denied in its entirety" on September 20, 2001. Id.

On November 7, 2001, Vasquez sought relief from his conviction in this Court by filing a habeas corpus petition under 28 U.S.C. § 2254 in which he claimed that he "was denied constitutionally adequate representation on his direct appeal because [his] appellate counsel ignored a preserved, meritorious argument and presented a claim that had not been raised by trial counsel," and that "the Appellate Division's disposition of [the] ineffective assistance claim [was] premised upon an unreasonable application of clearly established federal law." Petitioner's Mem. of Law at 11, 16, Vasquez v. Duncan, No. 01-cv-9839 (S.D.N.Y. Nov. 7, 2001). On October 16, 2003, Magistrate Judge Michael H. Dolinger, to whom this matter had been referred, issued a Report and Recommendation ("Report"), recommending that the petition be denied because, among other reasons, Vasquez "appellate counsel's performance [was not] deficient for Sixth Amendment purposes" and the Appellate Division's denial of Vasquez's coram nobis application "cannot be found to have unreasonably applied the clearly established federal law." Report at 37–43, Vasquez v. Duncan, No. 01-cv-9839 (S.D.N.Y. Oct. 16, 2003). On June 23, 2004, this Court adopted Magistrate Dolinger's Report in all material respects, concluding, among other things, that Vasquez's appellate counsel's performance was not constitutionally ineffective because the "(preserved) arguments of inadmissible hearsay . . . were made by appellate counsel" and "the Court does not believe the Appellate Division's denial of Petitioner's coram nobis application . . . involved an unreasonable application of clearly established Federal law." Order at 3, 8–9, Vasquez v. Duncan, No. 01-cv-9838 (S.D.N.Y. June 23, 2004).[6] On February 22, 2009, Vasquez filed a

[6] The parties agree that the Court's prior adjudication of Plaintiff's habeas corpus petition does not present any conflict in this case. (Letter from Patricia Bailey to Hon. Richard M. Berman, dated

motion to vacate his conviction pursuant to N.Y. C.P.L. § 440.10 "on the grounds of ineffective trial counsel, and that his sentence was unauthorized by law." See Vasquez, 36 Misc. 3d 1236(A) at *2. On October 9, 2009, the New York State Supreme Court denied Vasquez's motion. Id.

Conviction Vacated

On June 29, 2011, Vasquez filed in New York State Supreme Court a motion to vacate his conviction pursuant to N.Y. C.P.L. § 440.10(1)(g) based upon new evidence and on the grounds that "had such evidence been received at trial . . . the verdict would have been more favorable to the defendant." Vasquez, 36 Misc. 3d 1236(A) at *1. The basis for Vasquez's motion was the testimony of a fellow inmate, Alfred Charlemagne, who admitted to committing the robbery for which Vasquez had been convicted. (Compl. ¶ 31.)

On June 13, 2012, following a § 440.10 evidentiary hearing, at which Alfred Charlemagne, Janette Andriuolo, Raul Gonzalez, Rigo Gonzalez, Jr., Detective Litrenta, Leticia Vasquez (Vasquez's wife), Manhattan Assistant District Attorney Bonnie Sard, Esq., and Deborah Dearth, Esq. (Vasquez's attorney at his arraignment) testified, New York Supreme Court Justice Lewis Bart Stone found that the "newly discovered evidence . . . changes the analysis of Janette[] [Andriuolo's] testimony for truthfulness" and "such issues would be issues for a jury." Vasquez, 36 Misc. 3d 1236(A) at *15, 19. Justice Stone also found that Detective Litrenta **"developed sufficient evidence to show probable cause" and that "the Police and District Attorney . . . properly proceeded to try Vasquez and, as the First Department found, they submitted adequate evidence to the jury to convict."** Id. at *15, 19 (emphasis added).

Oct. 17, 2014 ("[T]he City and DANY defendants have no objections to Your Honor continuing to preside over this case."); Letter from Herbert Moreira-Brown to Hon. Richard M. Berman, dated Oct. 9, 2014 ("The plaintiff, Michael Vasquez, after consultation, has stated that he feels that no conflict of interest exists since the issue that was decided by this Court in 2004 is not one of the issues that the plaintiff has presented in his complaint.").)

Justice Stone vacated Vasquez's conviction and ordered a new trial. Id. at *16. He concluded that "a full consideration of the evidence, both at the trial, as reviewed by the First Department and the evidence at the § 440.10 hearing does not permit this Court to conclude beyond a reasonable doubt that a new jury would find Vasquez not guilty, as a Court might where by reason of DNA or an irrefutable record or a perjury conviction has totally destroyed the basis of the earlier conviction. Here, while one of the two victims has testified Vasquez was not the robber, the other victim [Andriuolo] picked him out from the photo array and line up, and testified at trial he was the robber." Id. at *19. Justice Stone also stated that "while it [was] Vasquez'[s] position that he was not a part of the robbery, the People introduced testimony at the § 440.10 Hearing to the effect that Vasquez suggested the robbery to Rigo [Gonzalez, Jr.] and later received a portion of the robbery proceeds." Id. at *11.[7]

On December 21, 2012, the New York County District Attorney's Office filed a motion to dismiss the Indictment against Vasquez, stating that while Vasquez "obviously played a role in the commission of the charged crimes," "the new body of evidence makes it difficult, if not impossible, for the People to prevail at a re-trial on the original theory that [Vasquez] acted as the principal in the charged robbery." (Recommendation for Dismissal, dated Dec. 21, 2012 (Defs. Mem. Exh. C), at 4.) On the same day, Justice Stone dismissed the Indictment. (Compl. ¶ 77.)

On March 15, 2013, Vasquez filed a claim with the New York State Court of Claims seeking damages for his "unjust and wrongful conviction and imprisonment" pursuant to N.Y. Ct.

[7] Justice Stone stated that "at the retrial all witnesses (other than the police officers who had no knowledge of the crime) could be characterized as criminals and dissimulators." Vasquez, 36 Misc. 3d 1236(A) at *17.

Cl. Act § 8-b.[8] (See Claim No. 122506 (N.Y. Ct. Cl. Mar. 15, 2013); see also 11/3/14 Tr. at 36–37 ("[THE COURT: [W]hat is the status of the court of claims case? [PLAINTIFF's COUNSEL: We have depositions of Mr. Vasquez on November 24th [2014] . . . And then we have we go back for [a] status conference on December 8th.").)

III. Legal Standard

In reviewing a motion to dismiss, the Court "must accept all non-conclusory factual allegations [of the Complaint] as true and draw all reasonable inferences in the plaintiff's favor." Simms v. City of New York, 480 Fed. App'x. 627, 629 (2d Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Biswas v. City of New York, 973 F. Supp. 2d 504, 511–12 (S.D.N.Y. 2013). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

IV. Analysis

(1) Doe Defendants

Vasquez's allegations with respect to the Doe Defendants consist entirely of general and conclusory statements devoid of any factual support. (See e.g., Compl. ¶ 25 ("Police Officers John Doe (#1-5) and New York Assistant District Attorney Ryan W. Brackley, Esq. conspired . . . ."); id. ¶ 29 ("Det. Joseph Litrenta, and Police Officers John Doe (#1-5) conspired . . . ."); id. ¶ 57

[8] Under N.Y. Ct. Cl. Act § 8-b, "any person convicted and subsequently imprisoned for one or more felonies or misdemeanors the claimant did not commit may present a claim for damages against the State." Reed v. State, 78 N.Y.2d 1, 7 (1991). A claimant must prove by "clear and convincing evidence" that (1) he was "convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment," (2) that he was "pardoned upon the ground of innocence" or "his judgment of conviction was reversed or vacated," (3) "he did not commit any of the acts" with which he was charged, and (4) "he did not by his own conduct cause or bring about his conviction." N.Y. Ct. Cl. Act § 8-b(5).

("Defendant Joseph Litrenta and NYPD officers, John Doe# 1-5, were part of a pattern, practice and policy of the City of New York . . . ."). Accordingly, Plaintiff's Federal claims against the Doe Defendants are dismissed. See Iqbal, 556 U.S. at 678.

(2) Alleged Deprivation of Federal Civil Rights

The Complaint does not specify which "Federal civil rights" Plaintiff was allegedly deprived of, although it makes conclusory reference to the "Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (Compl. ¶ 55.) In his Opposition, Plaintiff states that his claim is based upon "violations of [P]laintiff's 6th Amendment Constitutional Right to have compulsory process for obtaining witnesses who would testify in his favor." (Pl. Opp'n. at 8.) The Complaint alleges that, in connection with Vasquez's trial, a "material witness order" was issued for the production of Rigo Gonzalez Jr., who presumably could have provided exculpatory testimony on Vasquez's behalf, but that Defendant Brackley "fail[ed] . . . to secure the attendance of . . . Rigo Gonzalez, Jr" and "intentionally failed to notify, or inform or direct and have the Police Officers of the City of New York Police Department take custody of the person of Rigo Gonzalez, Jr. pursuant to the material witness order, and produce him in court so he could testify at the trial of plaintiff Michael Vasquez." (See Compl. ¶ 103; Pl. Opp'n. at 9.)

Plaintiff's claim fails because he provides no authority—under either Federal or New York law—for the proposition that ADA Brackley was required to secure the attendance of Rigo Gonzalez Jr. and to "produce him in court." Under New York law, N.Y. Crim. Proc. Law § 620.70, "[i]f a witness at liberty on bail pursuant to a material witness order cannot be found or notified at the time his appearance as a witness is required, or if after notification he fails to appear in such action or proceeding as required, the court may issue a warrant, addressed to a police officer, directing such officer to take such witness into custody anywhere within the state and to bring him

to the court forthwith." Plaintiff does not allege that he ever requested the trial court to issue a warrant for Rigo Gonzalez, Jr., or that ADA Brackley opposed such a request. See U. S. ex rel. Hunter v. Patterson, 374 F. Supp. 608, 610–11 (S.D.N.Y. 1974) (where petitioner "has failed to show that the defense made a genuinely diligent attempt to serve [the material witness] . . . failed to avail itself of any of the procedures for subpoenaing witnesses provided by the New York statutes . . . [and] no request was made by the defense that either the court or the prosecution aid it in attempting to produce [the witness].") [9]

To the extent the Complaint can be read to allege a constitutional violation by ADA Brackley based upon his alleged "refus[al] to grant limited immunity and allow . . . Gonzalez, Jr., to testify before the Grand Jury," (Compl. ¶ 27), the claim is dismissed because "[t]he Sixth Amendment does not support a claim for defense witness immunity." U.S. v. Turkish, 623 F.2d 769, 773 (2d. Cir. 1980). Moreover, as a prosecutor, ADA Brackley has absolute immunity from claims arising from actions that are "intimately associated with the judicial phase of the criminal process," Imbler v. Pachtman, 424 U.S. 409, 430 (1976), which includes the determination of whether to offer immunity to a potential witness. Mullinax v. McElhenney, 817 F.2d 711, 715 (11th Cir. 1987) ("[A] prosecutor is entitled to absolute immunity for the factual investigation necessary to prepare a case . . . . Offering a witness immunity in exchange for his testimony is a necessary adjunct to that factual development.")

To the extent that the Complaint may be read to allege a constitutional claim against

[9] At oral argument, counsel for Defendants submitted an affidavit, signed by Vasquez and dated January 22, 2009, in which Vasquez stated that, while awaiting trial, he "obtained a statement from Rigo Gonzalez Jr. . . . and he [Rigo Gonzalez Jr.] stated that I was not the person who committed the robbery. When I presented this statement to [Plaintiff's trial counsel] Mr. Liebman, he never called Rigo [Gonzalez] Jr. to testify, nor did he introduce the exculpatory statement he [Rigo Gonzalez Jr.] provided me with." (Exhibit B to Letter from Arthur G. Larkin to Hon. Richard M. Berman, dated Nov. 5, 2014, at ¶ 12.)

Detective Litrenta and ADA Brackley for, as counsel argues, "knowingly withholding and ignoring exculpatory evidence when they had an absolute duty to ensure against its use and bring it to the attention of the court and counsel," (Compl. ¶ 103), presumably in violation of Vasquez's rights under Brady v. Maryland, 373 U.S. 83 (1963), it also fails. As to Detective Litrenta, "the police satisfy their obligations under Brady when they turn exculpatory evidence over to the prosecutors." Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992); Vasquez, 36 Misc. 3d 1236(A) at *18 ("[Detective] Litrenta passed on his file to the District Attorney for processing."). Vasquez does not allege that Detective Litrenta failed to provide ADA Brackley with any allegedly exculpatory information obtained during the investigation. To the contrary, the Complaint relies upon Detective Litrenta's statement "that he told ADA Ryan W. Brackley everything about the statements made and evidence gathered during the investigation." (Compl. ¶ 57.)

With respect to ADA Brackley, it is well-settled that "a prosecutor enjoys absolute immunity for failure to disclose exculpatory evidence, because deciding what disclosure to make is part of a prosecutor's role as advocate, and constitutes a core prosecutorial function." Schnitter v. City of Rochester, 556 F. App'x. 5, 7 (2d Cir. 2014); see Warney v. Monroe County, 58 F.3d 113, 125 (2d Cir. 2009) ("if the prosecutors had tested all the evidence, and then sat on the exculpatory results for at least 72 days, they may well have violated Brady . . . but they would be absolutely immune from personal liability").

Finally, to the extent the Complaint brings a constitutional claim against Detective Litrenta based upon his alleged "intentionally misleading" grand jury and trial testimony, (Compl. ¶ 28), that claim is barred by absolute immunity extending to witnesses at grand jury and trial proceedings. Rehberg v. Paulk, 132 S.Ct. 1497, 1506 (2012) ("[G]rand jury witnesses . . . enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from

any § 1983 claim based on the witness' testimony.").

(3) Conspiracy Claim

Vasquez alleges that "Defendants, including A.D.A. Ryan W. Brackley, NYPD Detective Joseph Litrenta and New York City Police Officers, John Doe #1-5, conspired during the robbery investigation of Michael Vasquez, to falsely arrest the Plaintiff Michael Vasquez, without probable cause" and to "influence the presentment of indictment to the grand jury and/or the verdict at trial." (Compl. ¶ 57; see also id. ¶¶ 25, 27, 29.) Such conclusory allegations are plainly insufficient to state a conspiracy claim under § 1983, and are therefore dismissed. See Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed." (citation and quotation marks omitted)); see also Vasquez, 36 Misc. 3d 1236(A) at *19 ("[Detective Litrenta] developed sufficient evidence to show probable cause . . . .").

(4) Malicious Prosecution

In support of his malicious prosecution claim, Plaintiff alleges that "there was absolutely no probable cause for the arrest of Michael Vasquez" and that ADA Brackley "initiated the criminal proceeding, without the necessary probable cause." (Compl. ¶ 70.) To state a claim for malicious prosecution under § 1983, Vasquez must allege "(1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice." Savino v. City of New York, 331 F.3d 63, 72 (2d Cir. 2003) (citation omitted). "[T]he existence of probable cause to arrest is a complete defense to a claim of malicious prosecution." Id. at 75.

Detective Litrenta had probable cause to arrest Vasquez because Andriuolo positively identified Vasquez as the robber in a photographic array. Vasquez, 36 Misc. 3d 1236(A) at *3;

see also Mayer v. Moeykens, 494 F.2d 855, 858 n.2 (2d Cir. 1974) ("it cannot be doubted that the actual identification of appellant by the victim through photographs goes beyond mere suspicion and would . . . be sufficient to warrant a prudent man in believing that the [appellant] had committed . . . an offense." (internal quotation marks omitted)); Gaston v. City of New York, 851 F. Supp. 2d 780, 788 (S.D.N.Y. 2012) (victim's identification of attacker in a photo array and in a lineup established probable cause); Ackridge v. New Rochelle City Police Dep't, 09 Civ. 10396, 2011 WL 5101570 at *1 (S.D.N.Y. Oct. 25, 2011) ("The victim's identification from a photo array is sufficient to provide probable cause to arrest.").

Plaintiff argues that Andriuolo's identification "was tainted because she could not independently identify Michael Vasquez as the person who committed the crime," and "was in fact relying on the accusation of her boyfriend, Raul Gonzalez." (Compl. ¶¶ 63, 74). While the Complaint alleges that Andriuolo may have been aware of some alleged connection between the name "Michael Vasquez" and the January 11, 1997 robbery prior to the February 18, 1997 photo array, Plaintiff does not allege that Andriuolo had ever encountered or otherwise seen Vasquez prior to the photo array or that the photo array was suggestive, so as to undermine her photo array identification. The Complaint fails to allege any facts that Andriuolo's recollection of the robbery was not the source of her identification of Vasquez's photo. (See supra p. 8 n.5.)

And, even assuming arguendo that the photo array were suggestive, "[a] plaintiff cannot recover for an unduly suggestive identification if there is an intervening cause of his damages, usually the independent decision of the prosecutors and trial judge to admit the evidence." Newton v. City of New York, 566 F. Supp. 2d 256, 277 (S.D.N.Y. 2008). "Where an intervening decision-maker has permitted the admission of eyewitness testimony resulting from suggestive identification procedures, in order to preserve causality a plaintiff must prove that the wrongdoer misled or

coerced the intervening decision-maker." Newton v. City of New York, 640 F. Supp. 2d 426, 441 (S.D.N.Y. 2009) (quoting Wray v. City of New York, 490 F.3d 189, 194 (2d Cir. 2007)). Here, the trial court explicitly considered the propriety of Andriuolo's photo—and lineup—identifications of Vasquez at a Wade hearing, and denied Vasquez's application to suppress the identifications. See Vasquez, 36 Misc. 3d 1236(A) at *2 ("Judge Cropper denied Vasquez' Wade motion on July 14, 1997."). "It is not the duty of this Court to second-guess the decision of the trial court at a Wade hearing." Newton, 640 F. Supp. 2d at 443.

(5) Malicious Abuse of Process

A claim for malicious abuse of process requires that a defendant "(1) employ[] regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse of justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process." Savino, 331 F.3d at 76 (citation omitted).

Plaintiff alleges in conclusory terms that "Defendants Detective Joseph Litrenta, and Police Officer John Doe (#1-5) arrested Plaintiff in order to obtain a collateral objective outside the legitimate ends of the legal process and without probable cause." (Compl. ¶ 80.) The Complaint also alleges that "[t]he defendants had an ulterior purpose and motive to arrest and imprison Michael Vasquez without probable cause." (Id.) These unsupported allegations are plainly insufficient to state a claim for malicious abuse of process. See Jovanovic v. City of New York, No. 04–CV–8437, 2006 WL 2411541, at *12 (S.D.N.Y. Aug. 17, 2006) (where the plaintiff "allege[d] a collateral objective only in the most conclusory fashion, failing to provide any basis for assessing [a defendant's] motive"); Bouche v. City of Mount Vernon, No. 11 Civ. 5246, 2012 WL 987592, at *7 (S.D.N.Y. Mar. 23, 2012) (where "Plaintiff has not pled that the officers sought to achieve a collateral objective beyond or in addition to an arrest of a suspect and to close a homicide

case").

(6) Plaintiff's Claim against the City

Plaintiff contends that the City is liable for the alleged unconstitutional acts of the Detective Litrenta and ADA Brackley pursuant to Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978), on the grounds that it "has failed to take adequate steps to [d]iscipline those officers who arrest without probable cause, to properly train officers how to ascertain legally sufficient probable cause, to supervise to insure that arrest of individuals are made with legally sufficient probable cause or otherwise correct the improper and illegal conduct of said defendants and/or as a matter of policy and practice, has with deliberate indifference failed to take steps to uncover and/or correct such conduct and behavior." (Compl. ¶ 85.)

Preliminarily, there can be no liability under Monell absent an underlying constitutional violation. Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under Monell was entirely correct."). As noted above, Plaintiff has failed to plead underlying constitutional violations based upon Detective Litrenta's alleged failure to disclose exculpatory evidence; ADA Brackley's alleged violation of Vasquez's Sixth Amendment right to compulsory process, and Defendants' alleged malicious prosecution and abuse of process. Thus, to the extent Plaintiff's Monell claim rests upon these alleged constitutional violations, the claim is dismissed.

Plaintiff's claims against ADA Brackley based upon his alleged Brady violation and against Detective Litrenta based upon his alleged false testimony are dismissed on grounds of absolute immunity. (See supra pp. 15–16.) While such immunity does not preclude the City from being held liable, Askins v. Doe No.1, 727 F.3d 248, 254 (2d. Cir. 2013) ("[T]he entitlement of the

individual municipal actors to qualified immunity . . . is also irrelevant to the liability of the municipality."), a plaintiff must still meet the stringent pleading standard applicable to municipal liability claims under Monell. See id. at 253–54. Plaintiff fails to do so.

"[T]o hold a city liable under 1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Wray v. City of New York, 490 F.3d 189, 195 (2d Cir. 2009) (quotations and citation omitted). Plaintiff may plead such a policy or custom by alleging one of the following:

> (1) the existence of a formal policy officially endorsed by the municipality; (2) actions taken or decisions made by municipal officials with final decision making authority, which caused the alleged violation of plaintiff's civil rights; (3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials; or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to 'deliberate indifference' to the rights of those who come in contact with the municipal employees.

Guzman v. U.S., No. 11 Civ. 5834, 2013 WL 5018553, at *3 (S.D.N.Y. Sep. 13, 2013) (citations omitted).

Plaintiff's assertion that Defendants' actions "were part of a pattern, practice and policy of the New York Police Department (NYPD) and the City of New York to ignore and violate [] constitutional rights," (Compl. ¶ 40), is "plainly insufficient" to support a formal municipal policy claim. Missel v. Cty. of Monroe, 351 F. App'x. 543, 545 (2d Cir. 2009) ("The allegations that [the police officer] acted pursuant to a 'policy,' without any facts suggesting the policy's existence, are plainly insufficient."); see Usavage v. Port Authority of New York and New Jersey, 932 F. Supp. 2d 575 (S.D.N.Y. 2013) ("'Boilerplate' assertions of an unconstitutional policy do not suffice.").

Plaintiff also does not plausibly allege that any constitutional violations were caused by "actions taken or decisions made by municipal officials with final decision making authority." See

DeCarlo v. Fry, 141 F.3d 56, 61 (2d Cir. 1998) ("a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy.")

Nor does the Complaint adequately plead "a practice so persistent and widespread that it constitutes a [municipal] custom." See Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993) ("The mere assertion . . . that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference."). The Complaint lists fourteen disparate New York State court cases which purportedly "evidence" "various acts of misconduct" by the New York City Police Department. (Compl. ¶ 43.) This is plainly insufficient. None of these cases involves the misconduct alleged here. See Giaccio v. City of New York, 308 F. App'x. 470, 471–72 (2d Cir. 2009). And, all but two of Plaintiff's cited cases post-date Vasquez's 1997 conviction. See Connick v. Thompson, 131 S. Ct. 1350, 1360 n.7 ("[C]ontemporaneous or subsequent conduct cannot establish a pattern of violations that would provide notice to the city and the opportunity to conform to constitutional dictates.").

Plaintiff's conclusory allegations that the City failed to "properly train," "supervise," and "discipline" its police officers are unsupported by factual allegations and are, therefore, insufficient to state a claim for municipal liability under a "failure to train" theory. Dwares v. New York, 985 F.2d 94, 99 (2d Cir.1993), overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) ("[T]he simple recitation that there was a failure to train municipal employees does not suffice to allege that a municipal custom or policy caused the plaintiff's injury."); Triano v. Town of Harrison, NY, 895 F. Supp. 2d 526, 540 (S.D.N.Y. 2012) ("Plaintiff's mere claim that the Town failed to train and supervise its police officers is a boilerplate assertion and is insufficient, without more, to state a Monell claim."

(internal quotation marks omitted)).

(7) State Law Claims

Given the dismissal of Plaintiff's Federal claims, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims. See 28 U.S.C. § 1367 (a district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction"); A'Gard v. Perez, 919 F. Supp. 2d 394, 409 (S.D.N.Y. 2013) ("Because all of the plaintiff's federal claims are dismissed, the Court declines to exercise supplemental jurisdiction over the plaintiff's state law claims and dismisses them without prejudice.").

V. Conclusion & Order

For the foregoing reasons, Defendants' motion to dismiss [# 21] is granted. Plaintiff's Federal claims are dismissed with prejudice, and Plaintiff's remaining state law claims are dismissed without prejudice.[10]

Dated: New York, New York
November 6, 2014

RMB

RICHARD M. BERMAN, U.S.D.J.

[10] During the April 1, 2014 conference, the Court gave Plaintiff the opportunity to amend his initial complaint in light of the anticipated arguments presented by Defendants in their motion and also informed Plaintiff's counsel that Defendants' motion would, if successful, be "with prejudice." (Hr'g Tr., dated April 1, 2014 at 4:22–5:12 ("THE COURT: [T]he point I was trying to make is you now know what the [Defendants'] basis . . . is for your complaint to be dismissed. [PLAINTIFF'S COUNSEL]: Right . . . THE COURT: I am happy to have you amend . . . but that if ultimately his motion is successful, the case is over. [PLAINTIFF'S COUNSEL]: I understand, your honor. THE COURT: It is with prejudice. [PLAINTIFF'S COUNSEL]: Right. THE COURT: Because you had the chance to amend before we went through the motion. [PLAINTIFF'S COUNSEL]: OK.").) Plaintiff amended his complaint on April 25, 2014, and Defendants' submitted their joint motion on May 29, 2014.